Colorado Forge Corporation *and* Colorado Springs Die Sinkers, Local No. 520. Cases 27-CA-6499 and 27-CA-6692

February 9, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND ZIMMERMAN

On May 29, 1981, Administrative Law Judge Leonard N. Cohen issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, Respondent filed cross-exceptions and a supporting brief, and the Charging Party Union filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions [2] of the Administrative Law Judge and to adopt his recommended Order, as modified herein.[3]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Colorado Forge Corporation, Colorado Springs, Colorado, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Insert the following as paragraph 2(a) and reletter the subsequent paragraphs accordingly:

"(a) Expunge from its personnel files and records the warning notices unlawfully issued to employees Roy Whiteaker and Frank Trujillo on January 22, 1980, and to employees Darrel Emerick and James Osborne on April 21, 1980, and notify them, in writing, that it has done so."

2. Substitute the attached notice for that of the Administrative Law Judge.

IT IS FURTHER ORDERED that the complaint allegations not specifically found herein be, and they hereby are, dismissed.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT do anything that interferes with, restrains, or coerces employees with respect to these rights. More specifically,

WE WILL NOT interrogate employees concerning their union activities, sympathies, and desires.

WE WILL NOT threaten employees with layoffs, reductions in pay and hours, and other economic reprisals if they select the Union as their bargaining representative.

WE WILL NOT solicit employees to withdraw or resign from membership in the Union.

WE WILL NOT make promises of benefits if employees cease engaging in union activities.

WE WILL NOT unlawfully grant a wage increase which has the effect of interfering with employees' Section 7 rights; provided, howev-

[1] The General Counsel, Respondent, and the Charging Party Union have excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

In his Decision, the Administrative Law Judge made an inadvertent error in the section entitled "The Remedy." The date on which Respondent's backpay liability is tolled with respect to employee Kathman should be May 28, rather than May 18.

[2] None of the parties filed exceptions to the Administrative Law Judge's findings that Respondent violated Sec. 8(a)(1) of the Act by implementing a wage increase in January 1980. We adopt *pro forma* the Administrative Law Judge's finding concerning the increase.

Likewise, none of the parties filed exceptions to the Administrative Law Judge's finding that Respondent violated Sec. 8(a)(1) of the Act by its questioning of certain employees. For his finding the Administrative Law Judge relied on *PPG Industries, Inc., Lexington Plant, Fiber Glass Division*, 251 NLRB 1146 (1980). In the absence of exceptions to the finding, Chairman Van de Water finds it unnecessary to pass on the rationale set forth in *PPG Industries, Inc.*

[3] Although the Administrative Law Judge found that Respondent should be required to expunge from its records certain unlawfully issued warning notices, he inadvertently failed to order Respondent to do so; we shall modify the recommended Order accordingly.

er, that nothing herein shall be construed as authorizing or requiring us to abandon any benefits previously conferred.

WE WILL NOT issue written warnings to employees because they engaged in union activities or otherwise engaged in protected concerted activities.

We will not discharge employees because they engaged in protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

WE WILL expunge from our personnel files and records the warning notices unlawfully issued to employees Roy Whiteaker and Frank Trujillo on January 22, 1980, and to employees Darrel Emerick and James Osborne on April 21, 1980, and notify them, in writing, that we have done so.

WE WILL offer Robert Collins, Roy Whiteaker, Frank Trujillo, Joe Hunt, and Kevin Shepherd immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Robert Collins, Roy Whiteaker, Frank Trujillo, Joe Hunt, and Kevin Shepherd whole for any loss of earnings or other benefits they may have suffered as a result of our discrimination against them, together with interest thereon.

WE WILL make Bernard Kathman whole for any loss of earnings or other benefits he may have suffered as a result of our discrimination against him, together with interest thereon, from the date of his discharge to May 28, 1980.

COLORADO FORGE CORPORATION

DECISION

STATEMENT OF THE CASE

LEONARD N. COHEN, Administrative Law Judge: This matter was heard before me on July 31 and August 1 in Colorado Springs, Colorado, and August 11 and 12, 1980,[1] in Denver, Colorado, pursuant to complaints issued on February 28 and May 22 in Cases 27-CA-6499 and 27-CA-6692, respectively, by the Acting Regional Director for Region 27. The complaints which were consolidated for hearing by Order dated May 29 are based on charges filed on January 3 and April 22, respectively, and allege, *inter alia*, that Respondent violated Section 8(a)(3) and (1) of the National Labor Relations Act by (1) interrogating employees, soliciting its employees to resign their union membership, and threatening employees with economic reprisals because of their union activities; (2) laying off 10 employees on January 4 because of their union activities; (3) issuing written warnings to two employees on January 22; and (4) discharging six employees and issuing written warnings to two other employees on April 18 and 21, respectively, because the employees engaged in protected concerted activities.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of all parties.

Upon the entire record of the case and from my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. BUSINESS OF THE EMPLOYER

Respondent is a Colorado corporation with its principal office and place of business in Colorado Springs, Colorado, where it is engaged in the manufacture and sale of steel forgings. During the course and conduct of its business operations, Respondent annually sells and ships goods and materials valued in excess of $50,000 directly to points and places outside the State of Colorado. Accordingly, Respondent admits, and I find, that at all times material herein it has been an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. LABOR ORGANIZATION

Respondent admits, and I find, that Colorado Die Sinkers, Local No. 520 (herein called the Union), is and has been at all times material herein a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES ALLEGED

A. *Facts*[2]

1. Background

Respondent's forging operation is composed of two major production departments: a die shop and a hammer shop. Overall responsibility for the entirety of the operation rests with George Fiedler, Jr. (herein simply called Fiedler), Respondent's president and principal owner. John Krater, shop foreman, was at all times the immediate supervisor of the hammer shop while George Michael Fiedler, President Fiedler's son, was Respondent's treasurer and the firstline supervisor of the die shop in early January when certain layoffs of both die shop and hammer shop personnel alleged herein as unlawful were made. Prior to these layoffs, Respondent employed approximately 4 employees in the die sinker and die polish-

[1] Unless otherwise specified, all dates refer to 1980.

[2] Except wherein specifically noted, the material facts are not in dispute.

er classifications and approximately 27 employees in various classifications of the hammer shop.

2. The union demand

On the morning of December 28, 1979, David Tempia, Sr., the president of the Union and the father of David Tempia, Jr., a die polisher in Respondent's employ, Ron Condgon, vice president of the Union, and Gary Radtke, treasurer of the Union, went to Respondent's office and met with Fiedler in an informal meeting which lasted for more than an hour.[3]

At either the very start or near the conclusion or at both places during this rather lengthy meeting, Fiedler and the union representatives discussed the financial status of Respondent's business. All witnesses agreed that Fiedler, in very general terms, indicated that Respondent had a significant increase in sales and that 1979 was Respondent's "best year yet." Fiedler also indicated that he was contemplating in the future an expansion of his die shop operations.[4]

About this point in the meeting, Tempia informed Fiedler that a majority of the die shop employees had petitioned to have a union contract.[5] Fiedler expressed surprise since he had not previously heard anything in this regard and stated that he did not see the need for a third party. Fiedler explained that he paid comparable wages and benefits to those paid by the employers with union contracts. Tempia responded that wages were not the problem but that security of having a contract was. Fiedler indicated that he was thinking about putting a pension policy plan in.[6] While Fiedler did not agree to enter into a contract, he informed Tempia that the Union should drop off a contract at his office so he could look through it.

The discussion then turned to the hammer shop. Fiedler stated that if the die shop employees got a union contract, the hammer shop employees would find out and would surely want one also. Fiedler stated that there was a poor caliber of people working in the hammer shop. As an example, Fiedler recited the fact that since the operation began approximately 7 years earlier, he had employed over 400 different people in the hammer shop. When one of the union representatives asked if he were having any particular problems in the shop, Fiedler answered that he had hired several people, including Junior Lawrence, from the east and that he had recently had a confrontation with them. Fiedler added that these employees came from a union background and that they "stuck together like glue," and as soon as they heard about a union, they would also want it.[7]

The meeting then broke up amicably with Fiedler again suggesting the Union drop off a contract the following week so that he could determine how far apart they were.

3. The alleged evidence of animus and independent violations of Section 8(a)(1)[8]

Immediately following the meeting of December 28, Fiedler and Krater embarked on a course of conduct which the General Counsel alleges not only constitutes separate and independent violations of Section 8(a)(1), but also supplies evidence of Respondent's unlawful motivation in making the significant reductions in the work force the following week.

That same afternoon Fiedler telephoned Kenneth LaForest, a second-shift hammerman then on leave, to make sure that LaForest was returning to work that evening. During the course of their conversation, Fiedler mentioned Tempia's visit and expressed surprise regarding the employees' alleged desire to organize. LaForest responded that he had been on vacation in Vail, Colorado, and knew nothing about it. When Fiedler asked if there were any big problems at work, LaForest answered that he would talk to Fiedler at work that evening.

Later that evening, the two held a private conversation in which LaForest, in response to Fiedler's inquiry, indicated that there were indeed "big problems" at the plant. LaForest stated that these problems included insurance coverage, certain unspecified company policies, and that generally the employees' concerns were not over wages. Fiedler brought up the subject of pension plan by stating that it could be arranged for the die shop, but he could not give it to the hammer shop employees. During this portion of the conversation, Fiedler men-

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[3] All four participants testified in varying degrees of detail regarding what transpired. The three union witnesses testified in a generally corroborative fashion, and the events as set forth *infra*, except where specifically noted, are based on a composite of their testimony. In most respects Fiedler's testimony does not vary significantly from the testimony of the other witnesses. Where major conflicts do occur, they will be noted and resolved.

[4] The state of Respondent's financial condition will be dealt with in detail *infra*.

[5] No evidence was introduced showing what action, if any, die shop employees had engaged in with regard to the Union prior to this meeting. Additionally, it was not until the fourth day of the instant hearing that I was apprised of the fact that a petition seeking an election had even been filed. At that time I was simply informed that by Order dated April 16 the Board had granted the Employer's request for review vacating the Regional Director's Decision and Direction of Election in Case 27-RC-5977.

Subsequent to the filing of post-hearing briefs, the General Counsel filed a motion seeking that I conduct a hearing on certain challenged ballots and the Petitioner's objections arising out of the representation case. In support of this motion, which I denied by Order dated December 29, 1980, the General Counsel alleged that pursuant to a subsequent Decision and Direction of Election issued June 25, an election among Respondent's production and maintenance employees including both the die shop and hammer shop employees was conducted on July 30, the day before the instant hearing opened. In addition to the matters litigated before me, the Regional Director's Supplemental Decision and Order Directing Hearing in the representation case which issued on September 25 cites 9 objections and 11 challenged ballots as warranting a hearing.

[6] Fiedler did not testify to any mention of a pension plan during this meeting. I credit the testimony of three union witnesses that Fiedler did in fact mention the subject.

[7] Fiedler denied having knowledge that Lawrence, Riley Campbell, and Ed Elliot, the employees he hired in late October 1979 from Indiana, had worked in a union shop. When confronted with his affidavit, which clearly showed that he in fact possessed such knowledge at the time, Fiedler merely explained that his denial was in error.

While the record is somewhat sketchy, it appears that these three employees were fired by Krater in mid-December, Lawrence and Campbell for refusing a transfer to a different hammer and Elliot for staging a "one man strike." All three were rehired by Fiedler on the following day.

[8] Not specifically included in this subheading are certain conversations which more logically fit into subsequent subsections.

tioned the three employees he had brought in from Indiana to work in the hammer shop and observed that they were union people who would also want a union for that department.[9]

LaForest also had a conversation on the evening of December 28 with Krater. According to LaForest, Krater told him that December had been one of Respondent's best months financially and that Tempia, Jr., a die polisher, was the cause of all the problems they were having with the Union. Krater added that he would not tolerate it and that he would have fired Tempia.[10]

Subsequent to Fiedler's discussion with LaForest regarding employees' problems, Fiedler prepared a questionnaire which was distributed to the die shop employees the following day. This questionnaire reads "Please list any complaints or problems you are experiencing or feeling that hinder you or keep you from working at a productive level. Please list any additional fringes or increased wages that you feel you are not receiving now that you feel you should be."

When Fiedler personally handed the questionnaire to Tempia, Jr., he stated that the Union had petitioned Respondent. Fiedler added that he did not want a union coming in and that the Company and its employees could solve their differences without a union. Fiedler further testified that in reviewing the filled-in questionnaires, one of the die shop employees specifically requested an increase in wages.

Sometime later, Fiedler telephoned Clarence Schrader, a first-shift diesinker, while the latter was at a local club. According to Schrader, during this conversation which took place on January 2, Fiedler asked if he would accept a withdrawal card from the Union.[11] Schrader answered that he did not think so, but that he did not want to talk about it over the phone.

LaForest also testified as to receiving a similar phone call from Fiedler. According to LaForest, Fiedler called him while he was at work on January 3 and asked him to get a retirement card from the Union. LaForest answered that he could not. LaForest added that he was a member in good standing and that he had to make a living, and that if he did as asked, he would be blackballed or put out of the Union. At this point, Fiedler stated that he did not know at that time whether he wanted to go to a bigger or smaller die shop, and while he did not mind a union there, he could not tolerate a union in the hammer shop.

Fiedler's versions of these conversations differ substantially from those of Schrader and LaForest. According to Fiedler, during his face-to-face discussion with LaForest at the plant on December 28, he indicated that if there was any undue pressure on LaForest to organize through his membership, he could relieve those pressures by obtaining a retirement card. Since no counsel asked the specific question, it is not clear from the record whether LaForest made any response to this statement. Fiedler explained that he made this suggestion because LaForest had a serious health problem which had been the basis for LaForest's original assignment to work alone on the second shift.

Fiedler admits telephoning Schrader at the club, but testified that he merely noted to Schrader that he had a free choice to obtain a retirement card if he was getting undue pressure by outsiders. Schrader answered that he could not discuss it at the time since he was sitting with the union president. Fiedler explained that he made this suggestion to Schrader simply because he knew LaForest and Schrader were longtime members of the Union.

Initially, Fiedler, in agreement with Schrader, testified that this phone conversation took place on January 2. However, under questioning by me, Fiedler stated that his conversation with Schrader occurred sometime prior to his decision to lay off both LaForest and Schrader and that the phone call to Schrader took place shortly after he had a similar conversation with LaForest on December 28.

I have little difficulty in crediting LaForest's and Schrader's accounts of what was said to each regarding their possible withdrawal or retirement from union membership. Schrader, like LaForest, impressed me as an honest and generally trustworthy witness who, despite his layoff, harbored little animus toward his former employer. Moreover, each version tends to corroborate the other. However, I am not able to credit that portion of the respective testimony that places the date for these phone calls on or after January 2.[12] As will be detailed in a separate subheading *infra*, the uncontroverted record evidence establishes that on January 2 Respondent was informed that its loan application had been denied. Later that same day, Fiedler met with his supervisory and managerial staff and announced that not only would there be three layoffs among the die shop personnel, but that layoffs would be made by seniority. Since LaForest and Schrader were the two most junior diesinkers, no purpose could have been served by waiting until January 2 to attempt to get them to withdraw their union membership. Moreover, a careful reading of LaForest's credited version set forth above indicates that during the same conversation in which Fiedler asked LaForest to withdraw or resign from the Union, Fiedler mentioned

[9] The above account is based on the credited testimony of LaForest, who impressed me as a generally trustworthy witness. Fiedler's version of the above conversation differs from LaForest's in two major areas: a denial that he made any reference to Lawrence, Campbell, and Elliot, and the placing in this conversation of a discussion concerning the possibility of LaForest obtaining a retirement card from the Union. With regard to the first point, his reference is entirely consistent with Fiedler's earlier reference to Tempia concerning his belief that the employees from the east had a union background and would also want a union in the hammer shop. As to the second point of conflict, i.e., when he and LaForest had a conversation regarding the possibility of LaForest withdrawing from the Union, see the full discussion *infra*.

[10] Krater's testimony that the only time he discussed the Union with employees is when they would ask him a question, and that on those occasions he would limit his answers to "It don't matter to me" is not credited.

[11] It is undisputed that Fiedler had for some time known that both Schrader and LaForest were members of the Union by virtue of their earlier employment at local organized plants.

[12] The crediting of only portions of LaForest and Schrader's testimony is required under the circumstances of this case and does not require rejection of their entire testimony. *Carolina Canners, Inc.*, 213 NLRB 37 (1974), states: "Nothing is more common than to believe some and not all of what a witness says." *Edwards Transportation Company*, 187 NLRB 3-4 (1970), 437 F.2d 502 (5th Cir. 1971).

that he did not know at that time whether he wanted to go to a bigger or smaller die shop. While this statement is entirely consistent with the statement Fiedler had earlier made to the three union representatives, by January 2, the date LaForest and Schrader mistakenly testified their conversations took place, any tentative plans Fiedler may have had for expansion had been rendered moot by financial developments.[13]

4. The layoffs of January 4

On January 4 Fiedler prepared and posted a notice which states: "Due to general economic conditions we are adjusting our work schedule. This adjustment will result in some layoffs. These layoffs will be by seniority under job classifications. You will be notified by your supervisor if these layoffs affect you." The notice then specified that LaForest, Schrader, and Tempia, Jr., would be laid off from the die shop and that Junior Lawrence, Riley Campbell, Ed Elliot, Mel Lewis, Harry DeShane, Joe Pehl, and Rick Andrick would be laid off from the hammer shop. Additionally, the notice stated that George Michael Fiedler would be moved from his supervisory position to a diesinking classification.

Prior to posting this notice, Fiedler individually spoke to Schrader and Tempia. Schrader testified that on the morning of January 3, Fiedler came up to where he was working and took him into the inspection room. Once he shut the door, Fiedler announced that as of Friday, January 4, he was laying off him, LaForest, and Tempia. Fiedler stated that he did not want a union in the shop and was not going to have one. When Schrader asked if he was being laid off because of the Union, Fiedler answered no, it was because of a work shortage. Fiedler added that he knew Schrader was a strong union member, but he was not going to have the Union in the shop. At this point, Junior Lawrence walked into the room. Fiedler told Lawrence that he was having a meeting and to leave. After Lawrence left, Fiedler remarked that if Lawrence found out that the employees were having a union in the die shop, he would bring it in the hammer shop. Schrader then asked Fiedler if he knew what the layoff would do to him. Fiedler answered that he could not help it and that Schrader knew what he was getting into when he joined the Union.[14]

LaForest testified that he was not aware of his layoff until he came to work on the afternoon of January 4. After he read the notice, he went to Fiedler and stated that he wanted to be fair to his next employer and, therefore, he was asking for a 6-month leave of absence.[15] Fiedler answered that getting a leave of absence would be no problem. Fiedler then added that "it would probably all be over within a month."[16]

David Tempia, Jr., the die polisher, testified that on January 3 Fiedler called him into the inspection room and informed him that due to economic reasons he was being laid off. Fiedler told Tempia to finish his shift and take his tools home and leave.[17] Later that same afternoon, Tempia had a conversation with George Michael Fiedler. According to Tempia's uncontroverted account, George Michael Fiedler told Tempia that he was a good worker and he did not understand why Tempia was being laid off. George Michael Fiedler then added that business was going well.[18]

On the afternoon of January 3, Union Vice President Condgon went to the plant to pick up his tools.[19] While there, he met briefly with Georgie Michael Fiedler. According to Condgon's uncontroverted testimony, he asked Fiedler what was going on with the layoffs. George Michael answered that he did not understand the full extent of it. He then stated: "But my dad has worked long and hard for this business, and he's not about to give it away to anybody."

About 11 a.m. on Friday, January 4, Schrader and Tempia, Jr., arrived at Respondent's offices to pick up their final paychecks. When Fiedler saw them, he asked Schrader why he had quit. Schrader answered that he had not quit but had been laid off. Fiedler replied that Schrader had not reported to work that morning on schedule and unless he worked that afternoon, he would lose his rights for unemployment. At this point, Tempia asked if he too could work that afternoon. Fiedler answered no, that Tempia was a hot head and was going to learn a lesson the hard way.[20]

5. Additional alleged 8(a)(1) conversations

About 3 p.m. on January 9, Roy Whiteaker, a hammerman and a longtime acquaintance of Fiedler's father, was leaving the plant when he was approached by Fiedler. Fiedler indicated that his father was visiting from the east and asked if Whiteaker, his brother, and girlfriend, who were then waiting for him in the parking lot, would join the Fiedlers for dinner. According to Whiteaker's credited account, during this brief encounter Fiedler asked Whiteaker if he knew anything about the Union. When Whiteaker answered no, Fiedler stated that if the Union came into the shop, the employees would all

[13] As part of the General Counsel's case, employee Ed Elliot was called to testify regarding several conversations with Fiedler, Krater, and George Michael Fiedler concerning the Union. Elliot places some of the more damaging of these conversations as taking place even before the credible evidence indicates that management knew about its employees' activities or desires. Moreover, Elliot's testimony is extremely vague, confused, and smacks of fabrication. Therefore, I do not credit his testimony which at times is highly improbable even when uncontroverted.

[14] Fiedler testified that when he informed Schrader of the layoff, he merely stated that because of an economic crisis they had to bite the bullet and cut back. Fiedler denied recalling any mention of the Union during this conversation. However, his affidavit given to the Board states: "I also told him that I did not think we needed a third party in the shop."

[15] LaForest explained that it took some time to learn the methods of the new shop and it would not be fair to the new employer to take a job and leave shortly thereafter.

[16] Fiedler testified that he believed he informed LaForest of his layoff by phone on January 3. Fiedler did not deny the above-recited conversation which I fully credit.

[17] Fiedler's testimony confirms that of Tempia.

[18] Without explanation, George Michael Fiedler did not testify.

[19] Condgon had, on occasion, worked for Respondent on a part-time basis.

[20] The above account is based upon the composite testimony of Schrader and Tempia. Fiedler did not testify regarding this incident.

take a cut in pay and he would lay off the second and third shifts.[21]

Another hammerman, Frank Trujillo, testified that Fiedler approached him at his hammer about mid-day on January 10. According to Trujillo's uncontroverted testimony, Fiedler stated that he had heard that Trujillo was trying to get a union in. When Trujillo denied the report and added that he did not like unions and believed they simply caused trouble, Fiedler stated, "Good, because you would have to take a cut in pay."

6. The January 22 final warnings of Whiteaker and Trujillo

On Sunday evening, January 20, the Union held a meeting at a local hall. George Michael Fiedler had been invited to attend the meeting by an employee. When George Michael Fiedler went into the hall, he was asked to leave by Tempia, Sr., on the ground that he was part of supervision. Among the more than 20 employees attending the meeting were hammermen Frank Trujillo and Roy Whiteaker. On the following Monday morning neither Trujillo nor Whiteaker reported for work.[22]

As was his custom, Darrel Emerick stopped by Whiteaker's house on Monday morning, January 21, to give Whiteaker a ride to work. Whiteaker told Emerick that he was sick and to tell Krater that he would not be at work that day.[23] Emerick, upon arriving at work, relayed Whiteaker's message to Krater.[24] During either this conversation or a subsequent conversation later that same day, Krater asked Emerick if Whiteaker or Trujillo was head of or a part of the Union. When Emerick answered that he did not know, Krater replied that he thought they were and that was the reason he was going to lay them off.[25]

Trujillo neither called in nor attempted to get a message to Respondent that he was not coming to work on January 21. According to Trujillo's uncontroverted testimony, he had earlier informed Fiedler and Krater that since he did not have a phone, he would not call in to inform them that he would not be to work. According to his unassailable logic, he explained that if he was well enough to get to a phone, he might as well come to work. Trujillo testified that during the year he had worked for Respondent he had missed approximately 8 days due to illness and that on no occasion prior to this one had he ever received a warning.

Sometime during the day on January 21 Tempia, Sr. called Fiedler and stated that he did not think it was right for George Michael Fiedler to have attended the union meeting. Fiedler answered that he did not send his son to the meeting and in fact did not even know of the meeting. Fiedler then stated that he had two hammermen out and asked Tempia if they had told him they were not coming to work. When Tempia answered no, Fiedler stated that the only way he could make any money was to have hammermen running the hammers. At this point, Tempia asked Fiedler why he had indicated at the December 28 meeting that everything looked good economically and then just a few days later they all of a sudden developed a big economic problem. Fiedler answered that he did not have to tell Tempia his business.

On the following morning, Whiteaker and Trujillo were individually called into Fiedler's office and each was given a written final warning for unexcused and chronic absences. Trujillo testified that when he was handed the warning slip, Fiedler stated that it had nothing to do with the Union.

When Whiteaker was handed his notice, Fiedler asked why he had not reported to work. Whiteaker answered that he had been home with a black eye and a fat lip. Fiedler then asked why he had not called in. Whiteaker stated that he had asked Emerick to tell Krater. Whiteaker then turned to Krater and asked Krater if Emerick had not indeed told him. Krater confirmed that Emerick had.

The only additional evidence offered by Respondent to justify issuance of these warnings was Krater's undisputed testimony that both employees had bad attendance records. Additionally, Krater, in confusing and rather vague testimony, stated that Whiteaker had in fact been fired and rehired by Fiedler at some unidentified time for some unidentified act of misconduct.

7. Respondent's economic defense to the January 4 layoffs[26]

Although Respondent had been in operation for 6 years prior to 1979, only in its second year did it make a profit. During 1978[27] Respondent made a major expansion effort which included the addition of two new hammers for the hammer shop. With this expansion, Respondent projected that it would be able to double its sales and, therefore, dramatically improve its overall profit picture. While the expansion did, as predicted, substantially increase its total sales for the calendar year 1979, this increase did not alleviate Respondent's substantial cash flow problems or result in the hoped-for profits.

For some unidentified time preceding 1978, Respondent had operated with the assistance of loans from Exchange National Bank of Colorado Springs (herein called

[21] Fiedler was unable to recall having any such conversation. His affidavit states: "During that discussion I might have made a comment about the Union. I don't remember. I know that if there was a third party, the rules and regulations established by the third party might not permit me to be as flexible as they were dealing with me alone. I might have tried to indicate this to him that all the union contract rates for days are lower than what we are currently paying."

[22] The following account is based upon the credited testimony of Whiteaker, Trujillo, Darrel Emerick, a heater in the hammer shop, and Tempia, Sr. The testimony by Fiedler and Krater relating to Whiteaker's and Trujillo's past attendance record, while somewhat vague and conclusionary, stands uncontroverted.

[23] Whiteaker testified that the previous evening he had been in a fight and had suffered a fat lip, a black eye, and a sore nose. Presumably, Whiteaker's encounter took place after the union meeting.

[24] I do not credit Krater's denial that he only heard by rumor later that afternoon that Whiteaker had not come to work because he had been out "boozing" the night before.

[25] Emerick testified that on January 26 he and Krater had another conversation in which Krater again surmised that both Whiteaker and Trujillo were involved with the Union and that that involvement was the reason he was going to lay them off.

Neither Whiteaker nor Trujillo was in fact laid off during this period.

[26] The record facts concerning Respondent's financial plight are not in dispute. The above recitation is based on the credited and corroborated testimony of several witnesses, as well as documentary evidence.

[27] Respondent lost $38,178 for the calendar year 1978.

Exchange Bank).[28] Due to Respondent's continued inability to show a profit and its outdated and untimely accounting practices, Exchange Bank mandated in late 1978 that Respondent would have to make substantial changes in its accounting and auditing practices before the bank would continue to provide Respondent with necessary operating capital. Therefore, in late 1978 and early 1979 Respondent hired an accountant and changed auditors with the result that Respondent prepared and submitted to the Exchange Bank current monthly statements indicating, *inter alia*, profits and/or losses for each month, as well as the amount of inventory on hand and accounts receivable.

Having temporarily satisfied the Exchange Bank on its monthly reporting system, the bank agreed to loan money to Respondent on a monthly note in the amount of 80 percent of its inventory and accounts receivable. These monthly loans generally ranged from $700,000 to $900,000. Throughout 1979 Exchange Bank closely monitored the state of Respondent's financial condition. The officials at the bank were concerned that despite the substantial increase in sales, Respondent did not consistently show a month-end profit. Respondent would have several profitable months and then a catastrophe would occur and the bad month would destroy the previous positive results. In the judgment of the bank, the major problems continued to be the lack of operating capital necessary to maintain the required inventory of steel and the productivity level of Respondent's operations.

During the latter portion of 1979 the Exchange Bank took several additional steps to assist Respondent. First, the bank started loaning Respondent an amount equal to 95 percent of Respondent's inventory and receivables, and second, it employed an outside consultant to make an objective evaluation of the situation.

After studying Respondent's condition, the outside consultant made several suggestions, including obtaining a substantial long term loan which would enable Respondent to purchase the needed steel. Additionally, the consultant suggested that Respondent, in an effort to increase the productivity of the die shop, explore the possibility of contracting out certain die shop work which could be done cheaper elsewhere. Since the Exchange Bank was not willing to make any long term loan commitments and was in fact showing some growing reluctance to continuing its current loan arrangement with Respondent, Respondent approached three different financial institutions seeking the needed long term commitment. All three quoted an interest rate of 6 percent above the prime interest rate, terms that Respondent rejected as too high. Toward the end of the year, Respondent also approached its major customers seeking an agreement whereby they would purchase and warehouse their steel against future orders. While its major customers ultimately agreed in late February and March to do just this, Respondent received no positive response from them on its initial inquiry during 1979. Additionally, during the last 2 months of 1979 Respondent raised some of its prices to its customers.

[28] No details were offered regarding this loan arrangement during 1978.

At the suggestion of one of these customers, Respondent, on December 21, 1979, submitted to the United Bank of Colorado Springs a proposal for a line of credit of $1,200,000 which would include an amount of $300,000 for the purchase of real property on which Respondent held an option. This proposal further stated that a $900,000 line of credit would be sufficient for its present operation. While Respondent was initially told that his proposal was well received by the bank, on January 2 United Bank telephonically notified Respondent's accountant, Thomas Anderson, that it was denying Respondent's application.

As of late December, the most current financial data available to Fiedler was the November profit-and-loss statement. This statement showed that Respondent had a profit of over $9,000 for the month of November and a profit for the calendar year to date of slightly over $18,000. Although the year-end audit had not been completed, toward the very last few days of December, Anderson indicated to Fiedler that December was not a good month and that the best they could then hope for would be to break even for the year. In the latter portion of January, Respondent received its December profit-and-loss statement. This statement indicated that the results were very much worse than Anderson had predicted and that Respondent actually lost over $62,500 for the year 1979.

After communicating this news to Fiedler, Anderson and Fiedler met to discuss what could be done to help the situation. At the meeting both agreed that one method of cutting expenses would be to terminate immediately the leasing of offices away from the plant and to move the office to empty space at the warehouse adjoining the plant facility. The two also agreed that the personnel cutbacks and reduction in the number of parts manufactured would be necessary. Anderson told Fiedler that he could not assist in making those decisions, and Fiedler then left to study the situation further.

Fiedler went back to his office and determined the amount of steel that Respondent's cash flow would allow and correlated those figures into an hourly schedule measured by the minimum number of employees needed to achieve an 80 percent productivity level. Fiedler testified that he made heavier cuts in the die shop than in the hammer shop since the former was a set cost area and allowed more room for savings than did the hammer shop. Fiedler then showed his plan to his son, George Michael Fiedler. According to Fiedler, George Michael recognized the seriousness of the problem but did not want to cut back that far in the die shop. Fiedler informed his son that he would have to return to the die shop as a diesinker and would also have to pick up some of Tempia's die polishing duties.

Later, on January 2, Fiedler and his son then met with Krater, Robert Morgan, the materials manager, and Roger McMillin, the maintenance man. Fiedler sketched out his plan and asked if they thought they could meet an 80 percent productivity level with those personnel numbers. All agreed that they thought they could. Fiedler then ended the meeting by telling the group that he would make the layoffs by seniority in the job classifica-

tions. Fiedler, Krater, Morgan, and McMillin each testified that the subject of the Union was never mentioned during this meeting. Fiedler further testified that the subject was the furtherest thing from his mind that day. Fiedler then prepared the list of those employees to be laid off at the end of the week.

According to Fiedler, Schrader and LaForest were selected for layoffs since they were the least senior diesinkers. Tempia's job as die polisher was simply eliminated with George Michael Fiedler taking over some of Tempia's prior duties. No diesinkers or die polishers had been hired since the January 4 layoffs. Evidence was introduced that subsequent to these layoffs, Respondent began subcontracting to various other concerns certain work which had been previously performed in its die shop. While no specific evidence was produced to establish what percentage of work was subcontracted, Respondent did introduce documentary evidence which showed that the work which was subcontracted was performed at substantially less cost to Respondent than had it been performed by Respondent.[29]

Turning now to the hammer shop, Fiedler testified that, with the specific exception noted below, Lawrence, Campbell, and Lewis, as well as Pehl and Andrick, were the least senior employees in their respective job classifications. The one noted exception involves hammerman Lawrence. According to Respondent's January 1980 seniority list, Lawrence carried a seniority date of October 29, 1979, while hammerman William Vincent carried a seniority date of December 3, 1979. Fiedler was not questioned regarding this apparent inconsistency. It should be recalled, however, that Lawrence was discharged in mid-December and rehired by Fiedler the following day.

Elliot performed inspector functions and with his January 4 layoff, that position was, like the die polisher's, simply eliminated.[30] Further, Fiedler testified without contradiction that employee trimmer Harold DeShane was already on layoff status and Respondent's January 4 notice merely changed his layoff status from temporary to permanent. Fiedler further testified that Pehl had in effect quit prior to January 4. Andrick, the hammer shop utility man, was rehired on March 3, 1980, and hammerman Lawrence was rehired on May 13, 1980. Although a new hammerman was hired before Lawrence was actually recalled to work, Fiedler testified without contradiction that Respondent had at some earlier unspecified time offered Lawrence his old job back, but that Lawrence had refused at the time on the ground that he was then working elsewhere.

The reduction in the work force and the moving of the office were not the only examples of cost saving and revenue producing measures that Respondent instituted during January, February, and the beginning of March.[31] In January, Respondent again raised prices; and by late February, Respondent was able to convince its major customers to furnish their own steel. Additionally, Respondent instituted a policy of preparing the posting each day of a productivity report in the work area indicating to the employees the current status of operations.

8. The January pay raise

One cost *increasing* measure taken by Respondent during the second week of January was the granting of a 3 percent wage increase to all employees.[32] Fiedler testified that during June or July 1979 he had informed employees that he would try to give such increases and that in December, following the first price increase, he determined to give the raise. Fiedler explained the granting of a wage increase at about the same time the layoffs were made in the following terms:

> Well, we've gone through the highest inflation year. I knew the men were needing the money, and we were passing the cost along to our customers at that time. But we were also—in light of the whole situation, *I knew the productivity was the main instrument to turn the Company around.* I know it wouldn't—*if I were asking them to give me their fullest percent increase was fair at that time. So I kind of tied that in, too. That helped me make my decision as far as knowing where our productivity was and how much increase they had to give.* [Emphasis supplied.]

9. The April 18 incident

The General Counsel contends that Respondent violated Section 8(a)(1) by discharging six employees on Friday, April 18, and by issuing written warnings on Monday, April 21, to two other employees because of their participation in a protected work stoppage on the morning of April 18.

On Thursday, April 17, Respondent had four hammer crews operating in the hammer shop. A hammer crew consists of a hammerman, a heater, and a trimmer. While no evidence was offered regarding the temperature in the hammer shop at any time, including April 17, it is undisputed that the shop is indeed a very hot place to work. The cooling system in the shop consisted of various fans of differing sizes. On this particular day, Whiteaker's crew[33] had at the start of that morning's forging operations the use of a large standing fan. Sometime during the morning this large fan was moved away from Whiteaker's crew area to the work area of Joe Hunt's crew.[34]

Two separate and distinct problems developed that day with Whiteaker's crew: excessive smoke and exces-

[29] These figures show that the cost, with profit, of Respondent producing these products was approximately $40 an hour, while the cost to Respondent by the subcontractors for the same work was approximately $27 an hour.

[30] Fiedler testified that Krater agreed to perform that particular duty.

[31] The reduction in payroll amounted to approximately $8,000 a month and the rent reduction amounted to $375 a month.

[32] The record does not disclose how long its then current wage rate had been in existence.

[33] The crews are designated by the name of the hammerman who acts as the crew leader. Whiteaker's crew was comprised of Whiteaker as hammerman, Robert Collins as heater, and Bernard Kathman as trimmer.

[34] Hunt's crew included Darrel Emerick as heater and Kevin Shepherd as trimmer. The third crew working that day was comprised of Trujillo as hammerman, Rick Andrick as heater, and John Osborne as trimmer. The record does not disclose the identities of those employees working on the fourth crew.

sive heat. With regard to the former, for the first half of their 8-hour shift, Whiteaker's crew was using a motor oil as a lubricant on their hammer.[35] Although Whiteaker's hammer was apparently causing excessive amounts of smoke for some 5 hours, it was not until Fiedler was walking through the shop around noon that he observed the situation and instructed Krater to order Whiteaker's crew to switch to the graphite mixture.[36] Thereafter, they changed to the water soluble graphite lubricant. While this change had the effect of eliminating the smoke problem, it created another problem. As the hammer fell on the die, it took part of the scale off the part being forged and splashed it and burned the face of Kathman, the trimmer.

Sometime around 1 p.m., Bob Collins, the heater, became faint from the heat of the furnace and was sent outside the shop to recover. Krater replaced Collins himself and finished the shift without incident.[37]

Throughout the shift on April 17, the members of Whiteaker's crew spoke to members of Hunt and Trujillo's crews complaining about the heat and the smoke. That evening Whiteaker and Trujillo met with Tempia, Sr., at Whiteaker's home. They informed him of the problems at work and asked for his advice. Tempia merely suggested that they speak to Fiedler directly.

On April 18, shortly after 7 a.m., Whiteaker informed Krater that he wished to speak to Fiedler. He then left the work station and went to the employee locker room. He was followed shortly thereafter by Trujillo, Hunt, Kathman, Collins, and Osborne. Whiteaker then instructed Osborne to go back into the shop and to get the rest of the employees. After Osborne left,[38] Fiedler entered the locker room and asked them why they were not working.[39] Whiteaker responded that it was "too hot, too smoky and too dangerous." Fiedler answered that Whiteaker's crew had caused the smoke themselves and there was no smoke in the shop that morning. Someone then pointed to Collins' hands which were red. Fiedler answered that Collins was new and that it took both time and experience to learn how to heat properly and that Collins had to expect some discomfort initially. Kathman then spoke up and showed Fiedler his facial burns. Fiedler answered that the solution splashed on him because Kathman had used too much lubricant. Fiedler then suggested that Kathman wear a face mask.[40]

At this point, Fiedler told the employees to return to work. Whiteaker answered that they were not going to return to work until Fiedler called OSHA. Fiedler asked if they were refusing to work, and again Whiteaker repeated his earlier remark about OSHA. At this point, Fiedler told them to change clothes and come up to the office for their paychecks. As Fiedler left the locker room, he passed Shepherd, Osborne, Emerick, and Andrick. He told them to return to work. Fiedler added that if the others did not wish to work, they would be fired. The four employees remained in the shop area for some time thereafter. A few minutes later, Shepherd announced that he had decided to join the others. Shepherd then changed his clothes and went outside.

Still later that same morning, Collins, who was waiting outside the plant with the others for his final check, returned to the plant and talked with Osborne, Emerick, and Andrick. Collins attempted to convince the three to join the others. According to Emerick, Collins stated that there were threats outside and people were talking about breaking legs if the other employees did not join them outside.[41] Later that morning, Osborne and Emerick left the plant and joined their coworkers outside.

Several hours later, Fiedler issued final checks and termination reports to Whiteaker, Trujillo, Hunt, Collins, Kathman, and Shepherd. When Emerick and Osborne were individually called into Fiedler's office, each indicated that while they did not wish to join the others, they would be caught in the middle and afraid not to. Fiedler told each to go home and think about it over the weekend and to return on Monday.

On Monday morning, April 21, Osborne and Emerick did return and each was given a "Final Warning Report" which indicated that they had left work on April 18 before the end of their shift because of intimidation from coworkers.[42]

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[35] The record is somewhat unclear regarding the use of lubricants. While it appears that motor oil is used on some unusual jobs, on the majority of jobs that require the use of lubricant, a graphite based mixture is normally applied. Motor oil, unlike the graphite mixture, causes excessive smoke and tends to soften the dies.

[36] Krater's "explanation" as to why he, as shop foreman, did not take any steps to correct the situation himself is wholly unsatisfactory. Fiedler testified that not only was Whiteaker's crew using the wrong type lubricant, but that they were using excessive amounts.

[37] Krater who, as noted below, replaced Collins for the final hours of the shift as the heater on Whiteaker's crew, testified that the reason explosions were taking place was the excessive amount of lubricant Kathman was using. No evidence was offered that Krater, despite his experience, his admitted status as a supervisor, and his close proximity to the situation that afternoon, made any effort to instruct Kathman in the proper use of the lubricant. Moreover, by the testimony of Respondent's own witness, Howard Pardee, Respondent's vice president and part-owner, it appears that this splashing can and does occur even when the proper amount of lubricant is applied.

[38] During the locker room meeting Osborne remained in the shop talking to Shepherd, Emerick, and Andrick.

[39] The five employees present during the meetings, as well as Fiedler, testified at varying lengths regarding this meeting. There is no major conflict in their testimony, and the above account is based on a composite of their testimony.

[40] Kathman testified that on the morning of April 17 he asked Leonard Gilbert, the employee in charge of supplies, for a face mask and that Gilbert had answered there were none at the plant and that they had been ordered. Gilbert could not recall any such conversation. Gilbert further testified that if someone had requested a face mask and none were on hand, he would merely have secured one from a local supplier. I do not credit Kathman's uncorroborated and controverted testimony. First, although Kathman had been trimming for some time, it was only allegedly *on the morning* of April 17 that he, for the first and only occasion, requested a mask. As discussed above, the changeover to the use of graphite solution with the resultant explosions did not occur until the afternoon of the 17th. Therefore, no face mask would have even been necessary when he allegedly made his unsuccessful request. Moreover, as set forth in detail below, Kathman is a generally untrustworthy witness.

[41] Collins denied making any such threats. Osborne, while denying that Collins made or repeated any such threats, did sign a warning slip on Monday, April 21, which stated that he feared bodily injury or intimidation from his coworkers. Osborne explained that he did not tell Fiedler that he had been threatened, only that he was concerned about that possibility. Andrick did not testify. I credit Emerick's as a more probable version over the versions of Collins and Osborne.

[42] The complaint in Case 21-CA-6692 incorrectly alleges that Shepherd merely received a warning on April 21 rather than being discharged on April 18. Fortunately, the parties litigated this question as if it had been properly pleaded.

B. *Discussion*

1. The 8(a)(1) allegations

The credible evidence establishes that with the union demand of December 28, 1979, for a contract covering the die shop employees, Respondent, through Fiedler and to a lesser degree through Krater, immediately embarked on a campaign to undercut the union support among its employees. The purpose of Fiedler's actions and conduct during late December and early January was clear. Fiedler must discourage any organizational effort by the die shop employees, a proposition he could reluctantly accept, in order to prevent the hammer shop employees from joining their die shop colleagues in demanding union representation. Fiedler made no secret of his belief that it would take little effort to organize the hammer shop and that having the hammer shop so organized would "ruin" him. Fiedler, therefore, initially concentrated his efforts on the die shop employees and specifically on employees LaForest and Schrader whom he knew to be longtime union members.

The alleged instances of 8(a)(1) conduct set forth in the complaint, and as litigated before me, conveniently falls into three separate categories: interrogations and solicitations of grievances, attempts to get union members to withdraw or resign from union membership, and various threats of reprisals for engaging in union activities. Several of the conversations set forth in detail above include conduct which fits into more than one such category. For the sake of clarity, they will be discussed by subject matter.

a. *Interrogations and solicitation of grievances—promise of benefits*

On December 28 Fiedler had a lengthy conversation with LaForest in which he questioned him regarding LaForest's knowledge of any union activities by the employees. Fiedler then questioned LaForest over what problems existed at the plant that he and the other men were concerned with.

On the following day, Fiedler prepared a questionnaire specifically asking the die shop employees what were their work problems and what changes they desired. When handing out this questionnaire to Tempia, Jr., Fiedler indicated that it was prompted by the Union's demand for a contract.

Subsequently, on January 9 and 10, Fiedler had separate conversations with employees Whiteaker and Trujillo, respectively, in which Fiedler questioned them regarding their knowledge of or involvement in the union organizing effort. Additionally, Krater, in two separate conversations in the latter portion of January, specifically interrogated employee Emerick as to his knowledge of the union activity of employees Whiteaker and Trujillo.

That Fiedler and Krater's questioning of employees LaForest, Whiteaker, Trujillo, and Emerick, as referred to above, constitutes unlawful instances of interrogation warrants little discussion. As the Board held in *PPG Industries, Inc., Lexington Plant, Fiber Glass Division*, 251 NLRB 1146 (1980), an employer violates Section 8(a)(1) where it initiates questioning of an employee's sentiments or knowledge even in the circumstances where the employee is a known union supporter and the inquiries are unaccompanied by threats and promises. Here, the questioning was accompanied by threats, solicitation of grievances, and implied promises.

I find that Respondent also violated Section 8(a)(1) by both Fiedler's conversations with LaForest on December 28, and Tempia, Jr., on December 29 in which he solicited grievances, as well as by his passing out of the questionnaire to the die shop employees on December 29. Unlike the factual situation in *Uarco Incorporated*, 216 NLRB 1 (1974), a case relied on by Respondent, here, Respondent took no action to establish that it was not promising to remedy grievances. See *Merle Lindsey Chevrolet, Inc.*, 231 NLRB 478 (1977). In fact, the evidence clearly establishes that Respondent not only solicited the grievances as a direct result of the union activity, but that Respondent impliedly, if not expressly, as with the subject of establishing a pension plan, promised to remedy grievances. See *First Data Resources, Inc.*, 241 NLRB 713 (1979); *Modesti Brothers, Inc.*, 255 NLRB 911 (1981).

b. *Solicitation of retirement cards*

In separate conversations with both LaForest and Schrader, Fiedler requested that they withdraw or resign from the Union. Even when considering these remarks as separate and apart from Respondent's overall campaign to thwart the Union, Fiedler's conduct herein was a blatant attempt to interfere with his employees' Section 7 rights. *Smith's Complete Market of Tulare County, Inc., d/b/a Smith's Complete Market*, 237 NLRB 1424, 1428 (1978).

c. *Threats*

Respondent also committed separate violations of Section 8(a)(1) by: (1) Krater's statement to LaForest on December 28 that Tempia, Jr. was the cause of all the union problems and that if it were up to him, he would fire Tempia; (2) Fiedler's January 3 statement to Schrader while discussing the layoffs to the effect that Schrader knew what he was getting into when he joined the Union; (3) Fiedler's statements to Whiteaker and Trujillo on January 9 and 10 to the effect that the employees would have to take a cut in pay if the Union came into the plant; and (4) Krater's statements to Emerick on two occasions during late January to the effect that because of Whiteaker and Trujillo's involvement with the Union, he was going to lay them off. These statements and remarks amount to unlawful threats of economic reprisals for the employees engaging in union activities.

2. The layoffs of January 4

The Board, in *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), set forth the applicable test in all cases alleging violations of Section 8(a)(3) and (1) which turn on the employer's motivation. First, the General Counsel is required to make out a *prima facie* showing sufficient to support the inference that the protected conduct was a "motivating factor" in the employer's decision. Once that is established, the burden then shifts to

the employer to demonstrate that the same actions would have taken place even in the absence of the protected conduct.

Respondent's demonstrated strong union animus, when coupled with the timing of the layoffs, some 7 days after the union demand, creates a strong suspicion of Respondent's unlawful motivation. This suspicion is reinforced by virtue of Fiedler's remark to the Union, on December 28, that 1979 had been Respondent's "best year yet." Moreover, Fiedler further muddied the waters by bringing up the subject of the Union and committing additional independent violations of Section 8(a)(1) during his layoff discussions with employees Schrader, LaForest, and Tempia, Jr. While Fiedler in these conversations specifically denied to the employees that their union activities or sympathies played a part in their layoffs, Fiedler clearly attempted to capitalize on the layoffs by statements which were intended to thwart the current union activities, as well as to prevent a similar recurrence sometime in the future. The undenied remarks by George Michael Fiedler on January 3 that he did not know why Tempia, Jr., was being laid off since "business was going well," and that his father was not going to give the business to anyone cast still further suspicions on Respondent's motivation.

Juxtaposed to the above is the uncontroverted evidence that the layoffs were necessitated by Respondent's rapidly deteriorating financial condition. For the reasons set forth below, and notwithstanding the well-established union animus and the suspicious timing of Respondent's actions, I am persuaded that the General Counsel has not met its burden of establishing that protected conduct was "a motivating factor" in Respondent's decision to make the January 4 layoffs. *Mini-Industries, Inc.*, 255 NLRB 995 (1981). A few days following the December 28 union demand, Fiedler was informed by his accountant that the preliminary figures for the year-end audit were not good. Despite the fact that Respondent had shown an 11-month profit of some $18,000, Anderson told Fiedler that December appeared to be such a poor month that it would virtually wipe out the existing profit for the year. In late January, the December audit was finally completed and showed that Respondent actually suffered a year-end loss of over $62,500. Instead of being Respondent's "best year yet," 1979 turned out to be one of the worst years in Respondent's existence.

A few days later, on January 2, Fiedler was informed that his loan application which would have given him the long term financing necessary to operate was being denied. Because of these two developments, as well as the very real fear that because of them Exchange Bank would not continue its ongoing financial assistance, Fiedler, with the advice of his accountant and subsequent concurrence of his managerial staff, determined that immediate and substantial changes in the operations were now mandatory.

During the same month in which the layoffs were made, Respondent closed down its offices and moved them to the warehouse, raised its prices a second time to customers, renewed its efforts to have customers purchase their own steel, subcontracted out certain die shop work at a substantial savings and introduced and posted for the employees a daily progress and productivity report.

Despite the evidence of both Respondent's financial condition of early January and the evidence of the other cost-saving measures instituted concurrently with them, the General Counsel contends that the entire January 4 layoff was motivated by the Union's organizational demands. That this layoff included both the three employees in the die shop whom Fiedler knew were union members, as well as the three hammer shop employees with union backgrounds whom Fiedler suspected would, if given the opportunity, bring the Union into the hammer shop, is undeniable. However, it is likewise undeniable that these six employees were the least senior employees in their respective job classifications.[43] No evidence was presented that the other four hammer shop employees laid off on January 4 similarly supported the Union. Moreover, contrary to the contentions of the General Counsel, I do not find that Respondent's post-layoff hiring practices support the theory that the layoffs were merely used as a convenient excuse to rid itself of known union activists or adherents. No diesinkers or die polishers have been hired since the January layoffs. With regard to the hammer shop, two of the laid off employees, Andrick and Lawrence, were recalled to their former positions well prior to the Board election. Three of the laid-off employees, Campbell, Elliot, and Lewis, have never been replaced and two, Pehl and DuShane, were already on layoff as of January 4.

The final factor to be considered is the 3-percent across-the-board wage increase given to all employees in the second week of January. The General Counsel contends that this action not only constitutes an unlawful granting of benefits for the purpose of discouraging union activity, but renders Respondent's claim of economic necessity for the January 4 layoffs as pretextual.

Fiedler testified that he first discussed the pay raise with employees in June or July 1979 and that in December he determined that because of the first price increase, a pay raise could be given. More important, Fiedler further testified that the granting of a pay raise was an "integral part" of its overall efforts during January to reduce costs while at the same time increasing productivity. Fiedler reasoned that since he would be asking the remaining work force to put forth their fullest effort, it was only fair, in view of the rampant inflation, to grant the previously promised modest pay raise. Respondent's need for increased productivity during this critical stage of its existence can hardly be questioned. Further, that the granting of a small pay raise would in these circumstances serve to achieve the desired increased effort by the remaining employees was not an unreasonable position for Fiedler to have taken. Accordingly, I am satisfied that in granting the pay raise Respondent was motivated by economic considerations and not by a desire to thwart the Union. *Summitville Tiles, Inc.*, 190 NLRB 640, fn. 1 (1971); cf. *Steinerfilm, Inc.*, 255 NLRB 769 (1981).

However, in 8(a)(1) cases, proof of an unlawful motive is not a necessary element, and a violation of the Act can

[43] See sec. III,A, par. 12, above, concerning the seniority of Lawrence *vis-a-vis* hammerman Vincent.

and is made out if an employer's conduct, irrespective of its purpose, has the natural consequence of interfering with employees' Section 7 rights. Here, just 2 weeks prior to granting the raise Fiedler unlawfully solicited grievances from the employees and impliedly, if not expressly, promised to adjust their grievances. Fiedler's questionnaire specifically refers to an increase in wages, and at least one employee, in filling out the questionnaire, requested just such a pay raise. In these circumstances, and in light of the ongoing campaign of threats during the same period of time, I find that Respondent violated Section 8(a)(1) in the granting of the pay raise.[44]

3. The January 22 warnings of Whiteaker and Trujillo

Employees Whiteaker and Trujillo both attended the union meeting on Sunday evening, January 20, both failed to report to work on the following day, and both received written warnings for their absences when they returned to work on Tuesday, January 22. That Fiedler acquired knowledge of their attendance either from his son, George Michael Fiedler, who briefly attended the same union meeting, and/or during his phone conversation on January 21 with the union president is not open to serious dispute. Also not open to dispute is the fact that while both Whiteaker and Trujillo had less than exemplary attendance records prior to January 21, neither had ever received a written warning concerning his attendance prior to January 22. On this occasion, both followed their normal practice with regard to notifying Respondent of their absences—Whiteaker asked a coworker to inform Respondent, which was done, and Trujillo made no attempt at all to contact Respondent. On January 21, Foreman Krater asked employee Emerick if Whiteaker and Trujillo were heads of the Union. When Emerick denied any knowledge, Krater replied that he thought they were and that was the reason he was going to lay them off. That the eventual punishment meted out was less severe than predicted or promised hardly absolves Respondent from its unlawful conduct in merely issuing warnings.

Respondent made no attempt to explain why it chose to give these employees written warnings for their absences on January 21 when in the past it had always excused similar offenses. Based upon the foregoing, the conclusion is inescapable—never before had the employees engaged in union activities. Accordingly, I find that the General Counsel has made out a *prima facie* case under *Wright Line, supra*, and Respondent has not met its burden of demonstrating that the same action would have taken place even in the absence of the protected conduct.

4. The April 18 incident

The law is well settled that irrespective of its motives, an employer violates Section 8(a)(1) when it discharges or otherwise discriminates against employees who, when protesting against their terms and conditions of employment, engage in a concerted refusal to work. *N.L.R.B.* v. *Washington Aluminum Co.*, 370 U.S. 9 (1962).

Here, the hammer shop employees clearly and in an unambiguous manner informed their employer that they considered the hammer shop as "too hot, too smoky, too dangerous," and that they would not return to work until they were assured that Respondent would call OSHA to investigate these complaints. Rather than acceding to their demands, Respondent admittedly discharged these employees for their participation in the work stoppage. Clearly, this case falls within the principle set forth in *Washington Aluminum, supra.*[45]

In defense of these actions, Respondent argues that no problems existed on April 18 that justified the employees' demand for an OSHA inspection, and the employees' refusal to work was "nothing more than a bad faith attempt to harass their employer." In these circumstances, Respondent's argument continues, the employees, with full knowledge of the falsity of their claims, lost the protection under the Act. In support of this argument, Respondent contends that the record evidence establishes that the cooling system was satisfactory and was not a cause for employee discomfort; that the smoke in the hammer shop had been stopped by mid-afternoon on the 17th and was, therefore, no cause for concern; and that Kathman had no genuine concern about his burns from the use of the lubricant. Contrary to these contentions, I find that the record evidence clearly establishes that the source of the employees' concerns were conditions on the job which they, in good faith, legitimately believed to be dangerous. In this regard, the evidence is undisputed that on the afternoon of April 17, heater Collins succumbed to the heat of the furnace and had to be relieved of duty and that trimmer Kathman suffered repeated burns on his face from the splashing of the lubricant.

Further, Respondent argues that the employees on the other three crews had no apparent problems with the heat or the splashing of lubricant and that their satisfaction with their own personal working conditions taints their concerted actions and is affirmative evidence that the employees' only purpose was to disrupt and harass Respondent. This argument is lacking any factual or legal basis and warrants summary rejection. Even treated in the light most favorable to Respondent, the evidence merely establishes that the employees' choice for their course of action was arguably unnecessary, unwise, and/or unreasonable. However, it is well settled that the

[44] In finding that Fiedler was not unlawfully motivated in either making the January 4 layoff or in granting the subsequent pay raise, I have, of course, credited that portion of Fiedler's testimony concerning the factors that he considered in making the decisions. I am not unmindful that at other times herein I have not chosen to credit his testimony. As I have noted earlier (see fn. 12), the crediting of only portions of a witness' testimony is not unusual. Moreover, in reaching this conclusion I was greatly influenced by both the testimony of George Repetti, the vice president of Exchange Bank, and the supporting documentary evidence which clearly corroborates Fiedler's testimony that in early January a severe financial crisis came to a head and compelled drastic changes in Respondent's overall operations. Further, in explaining the basis for the layoffs, Fielder displayed both a keen recollection and understanding of the underlying facts. Unlike his testimony in other areas, this self-assured and positive testimony was believable.

[45] See *Audio Systems, Inc.*, 239 NLRB 1316 (1979); *Modern Carpet Industries Inc.*, 236 NLRB 1014 (1978), enfd. 611 F.2d 811 (10th Cir. 1979); *Union Boiler Company*, 213 NLRB 818 (1974).

Board does not pass on the reasonableness of the employees' complaints, and the merits of the underlying dispute are irrelevant.

Likewise, it is irrelevant that the employees who remained on the job on April 18 had no difficulty with the heat or lubricant. As the Board stated in *Union Boiler Company, supra:*

> . . . [T]he issue here is not the objective measure of safety conditions, it is whether these employees left their job because they thought conditions were unsafe. They could not have been penalized for so doing just because other employees tolerated such conditions or because, by some external standard, they were too safety conscious.

Accordingly, I find that Respondent violated Section 8(a)(1) by discharging employees Whiteaker, Hunt, Trujillo, Kathman, Collins, and Shepherd on April 18, and further violated Section 8(a)(1) by issuing written warnings to employees Osborne and Emerick on April 21.[46]

5. Kathman's post-discharge misconduct[47]

On May 27 Kathman filed an application for a loan from the Capital Savings and Loan Association, herein called the Association. The address on the application for Respondent was not its actual address, but was in fact a home address of an unidentified friend of Kathman. On June 2, Kathman received at the home of his friend the Association's request for verification of employment. Kathman filled in the form misrepresenting that he was then currently employed by Respondent with "a reasonable expectancy of continued employment." Kathman had the friend forge John Krater's signature, and Kathman then returned the completed form to the Association.

It is not clear when or how Kathman's unsuccessful attempt to obtain money under false pretenses came to Respondent's attention. Respondent, relying solely on case law in which the Board found that employees who had falsified certain records were not discharged in violation of the Act, contends that Kathman's post-discharge misconduct relieves Respondent of any remedial obligation with regard to Kathman. The cases cited by Respondent were of no value in deciding the question. Nonetheless, for the reasons set forth below, I am constrained to conclude that Kathman has forfeited his right to reinstatement and any backpay after May 28, the date on which he engaged in his serious act of misconduct.

Kathman, with no regard whatsoever for the truth, attempted to secure funds from a lending institution by first willfully misrepresenting his employment status with Respondent and then compounding the offense by forging the Employer's signature on the verification request. Although the matter was not litigated before me, I have no doubt that Kathman's conduct violated at least state, if not Federal, fraud statutes. In contending that Kathman should not be disqualified, the General Counsel argues that "Respondent did not offer any evidence that it would have discharged or even disciplined an employee for this conduct." I do not share the General Counsel's belief that Respondent, in these circumstances, bears any such burden. While Kathman was not attempting to secure funds directly from Respondent, it cannot be said that his misconduct was unrelated to his employment.[48] I regard Kathman's misconduct as no less outrageous or serious than instances where employees, even when emotionally upset and distraught over being unlawfully terminated, pilfered documents from their employer. *Uniform Rental Service, Inc.*, 61 NLRB 187, 190 (1966); *Offner Electronics, Inc.*, 134 NLRB 1064, 1075–76 (1961). In those situations, the Board denied the normal reinstatement and backpay remedy even though it had the effect of leaving a violation of Section 8(a)(3) as unremedied. No less stringent a policy is required here.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with Respondent's operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act. Having found that Respondent unlawfully issued warning notices to employees Roy Whiteaker and Frank Trujillo on January 22, and to employees Darrel Emerick and John Osborne on April 21, I shall recommend that Respondent expunge said warning notices from its personnel files and records.

Having found that Respondent unlawfully discharged Robert Collins, Joe Lee Hunt, Frank Trujillo, Roy Whiteaker, and Kevin Shepherd on April 18, I shall recommend Respondent offer them immediate and full rein-

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[46] I also reject as totally unsupported by the record or applicable law Respondent's assertion that since employee Shepherd did not participate in the employees' discussion with Fiedler, he was not a participant in any protected concerted activity and that, therefore, his termination for leaving before the end of the shift did not violate the Act. Shepherd was quickly aware on the morning of the 18th what had transpired in the lunchroom with Fiedler and he shortly thereafter informed both Fiedler and his coworkers that he shared their concerns with the working conditions and was joining in their protest. Additionally, employees Osborne and Emerick at some time later that morning also informed Fiedler that they were, for whatever their personal reasons, joining their colleagues in protesting the working conditions. When they returned to work on the following Monday, they received a warning for leaving early on the 18th. Contrary to Respondent's contentions, these warnings were given in retaliation for their engaging in protected concerted activities.

[47] The above account is based on Kathman's admissions during his cross-examination and the introduction of the "bogus" application he caused to be filed.

[48] Cf. *Jacob E. Decker & Sons*, 244 NLRB 875 (1979), a case relied on by the General Counsel. That case is clearly factually distinguishable from the instant situation in that the Board there affirmed without comment the Administrative Law Judge's conclusion that "in the absence of the unsuccessful union organizational drive and the unlawful discharges, the Company would not have disqualified . . . Orosco from continued employment."

statement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges previously enjoyed. I shall also recommend that Respondent make them whole for any loss of earnings and other benefits suffered by reason of Respondent's unlawful conduct. The loss of earnings shall be computed as prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest thereon to be computed in accordance with *Florida Steel Corporation*, 231 NLRB 651 (1977).[49] Further, having found that Respondent also discharged employee Bernard Kathman on April 18, but that Kathman engaged in such a serious act of misconduct as to forfeit reinstatement and backpay after the date of his misconduct, I shall also recommend that Respondent make Kathman whole for any loss of earnings and other benefits suffered by reason of Respondent's unlawful conduct from the date of discharge to May 18.

Upon the basis of the foregoing findings of fact and upon the entire record in these case, I make the following:

CONCLUSIONS OF LAW

1. Respondent Colorado Forge Corporation is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Colorado Die Sinkers, Local No. 520, is a labor organization within the meaning of Section 2(5) of the Act.

3. By issuing written warnings to Roy Whiteaker and Frank Trujillo on January 22, 1980, because of their activities on behalf of the Union, Respondent violated Section 8(a)(3) and (1) of the Act.

4. By issuing written warnings to employees Darrel Emerick and John Osborne because of their protected concerted activities, Respondent violated Section 8(a)(1) of the Act.

5. By discharging Robert Collins, Roy Whiteaker, Joe Hunt, Frank Trujillo, Kevin Shepherd, and Bernard Kathman on April 18 because of their protected concerted activities, Respondent violated Section 8(a)(1) of the Act.

6. By its other conduct found above which interfered with, restrained, and coerced employees in the exercise of the rights guaranteed them in Section 7, Respondent has violated Section 8(a)(1) of the Act.

7. Respondent did not violate the Act in making the January 4 layoffs as alleged in the complaint in Case 27-CA-6499.

Upon the foregoing findings of fact, conclusions of law, and the entire record in this proceeding, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[50]

The Respondent, Colorado Forge Corporation, Colorado Springs, Colorado, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interrogating its employees concerning their union activities, sympathies, and desires.

(b) Threatening employees with layoffs, reductions in pay and hours, and other economic reprisals if they select a union as their bargaining representative.

(c) Soliciting its employees to withdraw or resign from membership in the Union.

(d) Making promises of benefits if the employees cease engaging in union activities.

(e) Unlawfully granting a wage increase which had the effect of interfering with the employees' Section 7 rights. However, nothing herein shall be construed as authorizing or requiring Respondent to abandon any benefits previously conferred.

(f) Issuing written warnings to employees because of their activities on behalf of the Union.

(g) Issuing written warnings to employees because they engaged in protected concerted activities.

(h) Discharging employees because they engaged in protected concerted activities.

(i) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which I find will effectuate the policies of the Act:

(a) Offer Robert Collins, Roy Whiteaker, Joe Hunt, Frank Trujillo, and Kevin Shepherd immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges; make whole Collins, Whiteaker, Trujillo, Hunt, and Shepherd for any loss of earnings suffered as a result of the discrimination against them in the manner set forth in the section of this Decision entitled "The Remedy"; and make whole Bernard Kathman for any loss of earnings he suffered as a result of the discrimination against him from the date of his discharge until May 28.

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this recommended Order.

(c) Post at its Colorado Springs, Colorado, facility copies of the attached notice marked "Appendix."[51] Copies of said notice, on forms provided by the Regional Director for Region 27, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for a period of 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that

[49] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[50] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided by Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[51] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 27, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.